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Darul Fikir v Dewan Bahasa dan Pustaka

B HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22IP-37–09 OF 2017
WONG KIAN KHEONG J
14 JUNE 2018

C *Civil Procedure — Injunction — Interlocutory injunction — Whether interim prohibitory injunction should be granted — Whether Dewan Bahasa dan Pustaka a legal entity — Whether damages adequate remedy — Whether balance of convenience lay heavily against granting interim injunction — Whether granting interim injunction contrary to public interest*

D

The plaintiff was a partnership which was an exclusive distributor of an Islamic religious book, *Mushaf Al-Quran Bertajwid dan Berwarna*. The Ministry of Education appointed the plaintiff to supply the books for the use of primary school students throughout Malaysia in 2017. The plaintiff then entered into
E a contract with the defendant to print, supply and distribute the books. The defendants then issued an open tender inviting Bumiputera book suppliers registered with the defendant to bid for a contract to print, bind and supply the books for 2018. The plaintiff then commenced the present suit against the defendant based on the defendant's alleged breaches of the contract. In the
F present suit, the plaintiff filed an application for an interlocutory injunction to restrain the defendant from: (a) acting on the tender; and (b) performing any work on the printing and supply of the books without the plaintiff's written consent.

G **Held**, dismissing the plaintiff's application with costs:

(1) Based on long title of the Dewan Bahasa dan Pustaka Act 1959 ('the Act') and various provisions therein, the Parliament had clearly intended for the Board of Control of the defendant ('the board') to be the statutory
H entity for the purpose of all legal proceedings. Therefore, the board and not the defendant should have been sued by the plaintiff in the present action. Further, there was a maxim of equity that 'equity follows the law' which meant that the application of equity shall be subject to the operation of statutes. The court should not exercise its discretionary
I power to order an interlocutory injunction against the defendant which was contrary to the Act (see para 8).

(2) Clause 5 of the contract and Schedule E to the contract provided that the total payment for the plaintiff's services was RM8,175,998.42. As such, damages were an adequate remedy for the plaintiff in the present action.

The plaintiff also failed to discharge the evidential burden to persuade the court that damages were not a sufficient relief for the plaintiff in the present case (see paras 10–11).

(3) A refusal of granting interlocutory injunction carried a lower risk of injustice than to allow it in the present case. If the injunction was allowed, it would cause serious and irreparable prejudice to primary school students of the Islamic faith throughout Malaysia as they would be deprived of the books for the purpose of the religious education. Such a prejudice could not be compensated in monetary terms and the grant of such an interlocutory injunction was clearly contrary to public interest (see paras 13 & 16).

[Bahasa Malaysia summary

Plaintif merupakan satu perkongsian yang merupakan pengedar ekslusif buku penmbelajaran agama Islam, *Mushaf Al-Quran Bertajwid dan Berwarna*. Kementerian Pendidikan telah melantik plaintif untuk membekalkan buku-buku untuk kegunaan pelajar sekolah rendah di seluruh Malaysia pada tahun 2017. Plaintif kemudian memasuki satu kontrak dengan defendan, untuk mencetak, membekal dan mengagihkan buku-buku tersebut. Defendan kemudiannya mengiklankan satu tender terbuka dan menggalakkan pembekal buku Bumiputera berdaftar dengan defendan untuk membida untuk dapatkan kontrak mencetak, mengikat dan membekalkan buku-buku untuk tahun 2018. Plaintif kemudian telah memulakan tindakan semasa terhadap defendan atas alasan terdapat pelanggaran kontrak yang dilakukan oleh defendan. Dalam tindakan semasa, plaintif mengfilkan satu permohonan untuk mendapatkan injuksi interlokutori untuk menghalang defendan: (a) bertindak berdasarkan tender; dan (b) menjalankan apa-apa kerja mencetak dan membekallan buku-buku tanpa keizinan bertulis daripada plaintif.

Diputuskan, menolak permohonan plaintif dengan kos:

(1) Berdasarkan pada tajuk panjang Akta Dewan Bahasa dan Pustaka 1959 ('Akta tersebut') dan peruntukan–peruntukan dalam Akta tersebut, Parliamen dengan jelas berniat untuk menjadikan Lembaga Kawalan bagi defendan ('lembaga tersebut') sebagai suatu entiti statutori untuk semua tujuan prosiding perundangan. Oleh itu, lembaga tersebut yang sepatutnya disaman oleh plaintif, bukannya defendan. Tambahan pula, terdapat perumpamaan latin 'ekuiti mengikuti undang-undang' yang bermaksud pemakaian ekuiti adalah tertakluk pada penggunaan statut. Mahkamah tidak sepatutnya menggunakan kuasa budi bicara untuk memberikan injuksi interlokutori kepada defendan yang mana ianya bertentangan dengan Akta tersebut (lihat perenggan 8).

(2) Klausa 5 dan Jadual E kontrak tersebut mengatakan bahawa jumlah bayaran untuk perkhidmatan plaintif adalah sebanyak

RM8,175,998.42. Oleh itu, ganti rugi adalah remedi yang mencukupi untuk plaintif dalam tindakan semasa. Plaintif juga gagal untuk melepaskan beban keterangan untuk menyakinkan mahkamah bahawa ganti rugi adalah suatu relif yang tidak mencukupi untuk plaintif dalam kes semasa (lihat perenggan 10–11).

(3) Keengganan untuk membenarkan injuksi interlokutori membawa risiko yang lebih rendah berbanding sekiranya injuksi itu dibenarkan dalam kes semasa. Sekiranya injuksi tersebut dibenarkan, ianya akan memprejudiskan secara teruk dan serius kepada pelajar sekolah rendah yang beragama Islam diseluruh Malaysia disebabkan mereka akan terkesan dengan penggunaan buku-buku tersebut bagi tujuan pendidikan agama. Kesan prejudis tersebut tidak dapat digantikan secara istilah kewangan dan pemberian injuksi interlokutori tersebut dengan jelas bertentangan dengan kepentingan awam (lihat perenggan 13 & 16).]

Notes

For cases on interlocutory injunction, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4448–4669.

Cases referred to

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors [1995] 1 MLJ 241, SC (refd)

Associated Tractors Sdn Bhd v Chan Boon Heng & Anor [1990] 2 MLJ 408; [1990] 1 CLJ Rep 30, SC (refd)

Gerak Indera Sdn Bhd v Farlim Properties Sdn Bhd [1997] 3 MLJ 90, CA (refd)

Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193, CA (refd)

Khoo Kay Aun (selaku pegawai awam dan mendakwa bagi Swee Thong Tong Khoo Kongsi) & Ors v Koe Liew Hin (sebagai wasi bagi wasiat Koe Choon Keng, si mati) & Anor [2016] MLJU 1774; [2016] 1 LNS 1455, CA (refd)

La Kaffa International Co Ltd v Loob Holdings Sdn Bhd [2018] 7 MLJ 305, HC (refd)

Saonah bte Bedul v Pentadbir Tanah dan Daerah Melaka Tengah [1994] 3 MLJ 758, HC (refd)

Saw Seng Kee v Director of Lands & Mines, Penang & Ors [1987] 1 MLJ 80 (refd)

Wong Kim Fatt v Leong & Co Sdn Bhd & Anor [1976] 1 MLJ 140, HC (refd)

Legislation referred to

Dewan Bahasa dan Pustaka Act 1959 ss 3(1), (2), 6(1), 7(1), (2), 26
Rules of Court 2012 O 15 r 6(1)

Mokhzani Haris bin Mohd Yusof (Amirul & Najib) for the plaintiff.

Md Radzi bin Mustafa (Radzi & Abdullah) for the defendant.

Wong Kian Kheong J:

INTRODUCTION

[1] This judgment raises a novel question of whether 'Dewan Bahasa dan Pustaka' ('DBP') is a legal entity against whom legal proceedings can be instituted.

[2] The plaintiff is a partnership which is an exclusive distributor of an Islamic religious book, *Mushaf Al Quran Bertajwid dan Berwarna* ('book').

[3] By a letter dated 19 April 2016, the Ministry of Education appointed the plaintiff to supply the books for the use of primary school students throughout Malaysia in 2017. On 2 September 2016, the plaintiff entered into a contract with DBP to, among others, print, supply and distribute the books ('contract').

[4] On 18 September 2017 DBP issued an open tender inviting Bumiputera book suppliers registered with DBP to bid for a contract to print, bind and supply the books for 2018 ('tender').

PROCEEDINGS

[5] The plaintiff commenced this suit against DBP based on DBP's alleged breaches of the contract ('this action'). In this action, the plaintiff filed an application for an interlocutory injunction (encl 4) to restrain DBP from:

(a) acting on the tender; and

(b) performing any work on the printing and supply of the books without the plaintiff's written consent

— pending the disposal of this action.

THE COURT'S APPROACH IN DECIDING INTERLOCUTORY RESTRAINING INJUNCTION APPLICATIONS

[6] In *La Kaffa International Co Ltd v Loob Holdings Sdn Bhd* [2018] 7 MLJ 305, at para 28, I have adopted the following approach in determining interim prohibitory injunction applications:

> 28 In deciding how the court may exercise its discretion to grant an interim prohibitory injunction, the following considerations are relevant:

(1) whether a plaintiff has satisfied the court that there is at least a bona fide and serious question to be tried in respect of the plaintiff's cause of action against the defendant — please see the Supreme Court's judgment delivered by Mohd Jemuri Serjan CJ (Borneo) in *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241, at p 253. If a plaintiff cannot satisfy the court that there is at least a bona fide and serious issue to be tried in respect of the plaintiff's cause of action against the defendant, the court shall refuse to grant an interim restraining injunction on this ground alone; and

(2) if a plaintiff satisfies the court that there is at least a bona fide and serious question to be tried —

(a) whether damages constitute an adequate remedy for the plaintiff. If damages are a sufficient relief for the plaintiff, the court may refuse to give an interim prohibitory injunction — please see the decision of Hashim Yeop Sani CJ (Malaya) in the Supreme Court case of *Associated Tractors Sdn Bhd v Chan Boon Heng & Anor* [1990] 2 MLJ 408; [1990] 1 CLJ Rep 30, at p 32;

(b) if damages do not constitute an adequate remedy for the plaintiff, whether the 'balance of convenience' (some cases use the phrase 'balance of justice') lies in favour of the grant or refusal of an interim restraining injunction. If the balance of convenience is not in favour of the grant of an interim prohibitory injunction, the interim prohibitory injunction should be refused on this ground alone — *Alor Janggus Soon Seng Trading*, at p 266; and

(c) if the balance of convenience is in favour of granting an interim restraining injunction, is there any policy or equitable consideration which militates against the grant of an interim restraining injunction? (please see Gopal Sri Ram JCA's (as he then was) judgment in the Court of Appeal case of *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193, at pp 206–207).

Even if a plaintiff has satisfied the court:

(i) of the existence of a bona fide and serious issue to be tried;

(ii) damages are not an adequate remedy; and

(iii) the balance of convenience lies in favour of a grant of an interim restraining injunction

— the court may still exercise its discretion to refuse an interim prohibitory injunction on policy or equitable ground.

IS DBP A LEGAL ENTITY?

[7] The title to the Dewan Bahasa dan Pustaka Act 1959 ('the DBPA') states that DPBA is an 'Act to institute and establish a body to be known as the Board of Control of (DBP) to promote the development of language and literature in

Malaysia'. I reproduce below the relevant provisions in the DBPA:

s 3(1) There shall be established a Board to be called the 'Board of Control of the Dewan Bahasa dan Pustaka' ...

(2) *The Board shall be a body corporate with perpetual succession and a common seal.*

6(1) *It shall be the duty of the Board to formulate and implement policies in the carrying out of its objects*.

7(1) *The Board shall have the power to do anything and to enter into any contract or business transaction (whether or not involving expenditure, the acquisition, use and disposal of any movable, immovable, tangible or intangible property) which in its opinion is calculated to facilitate the performance of its duties or the exercise of its powers effectively*:

Provided that this power shall not include the power to borrow other than as provided in subsection 19(2).

(2) *Without prejudice to the generality of subsection (1), the Board shall have the power —*

(a) to carry out any commercial, industrial, research or training activity or any other activity the carrying out whereof appears to it to be requisite, advantageous or convenient for or in connection with the performance of its duties or the exercise of its powers;

(b) to impose fees or any other charges it deems fit for services that the Board is requested to carry out, render or perform;

(c) to receive in consideration of the services carried out, rendered or performed by it such commission or payment as may be agreed upon; and

(d) *to perform all duties and exercise all powers which, under any written law, are or may be, or may become, vested in the Board or are delegated to the Board*.

s 26 *The Public Authorities Protection Act 1948 [Act 198] shall apply to any action, suit, prosecution or proceeding against the Board or against any member, officer, servant or agent of the Board in respect of any act, neglect or default done or committed by him in such capacity*. (Emphasis added.)

[8] I am of the view that there is no bona fide and serious question to be tried in this action as regards DBP. On this ground alone, encl 3 is dismissed with costs. This decision is premised on the following reasons:

(a) based on the DBPA's long title, ss 3(1), (2), 6(1), 7(1), (2) and 26 of the DBPA, Parliament has clearly intended for the 'Board of Control' of DBP ('the board') to be the statutory entity for the purpose of all legal proceedings. Accordingly, by reason of DBPA, the board (not DBP) should have been sued by the plaintiff in this action. In fact, under s 7(1) of the DBPA, the contract should have entered into by the board (not DBP);

(b) in deciding an interim injunction application, the court exercises its discretion on whether an equitable remedy of interlocutory injunction should be granted or otherwise. There is a maxim of equity that 'Equity follows the law' (the application of equity shall be subject to the operation of statutes) — please see Chang Min Tat J's (as he then was) decision in the High Court case of *Wong Kim Fatt v Leong & Co Sdn Bhd & Anor* [1976] 1 MLJ 140 at p 142. The court should not exercise its discretionary power to order an interlocutory injunction against DBP which will be contrary to the DBPA's long title, ss 3(1), (2), 6(1), 7(1), (2) and 26 of the DBPA; and

(c) even if this court grants any interlocutory injunction in the plaintiff's favour against DBP, such an order cannot be enforced against a non-entity. There is a maxim in equity that 'Equity does not act in vain' — please see Idrus Harun JCA's judgment in the Court of Appeal case of *Khoo Kay Aun (selaku pegawai awam dan mendakwa bagi Swee Thong Tong Khoo Kongsi) & Ors v Koe Liew Hin (sebagai wasi bagi wasiat Koe Choon Keng, si mati) & Anor* [2016] MLJU 1774; [2016] 1 LNS 1455, at para 34.

[9] I am aware that under O 15 r 6(1) of the Rules of Court 2012 ('the RC'), a suit shall not be defeated by reason of a non-joinder of any party. However, the plaintiff cannot rely on O 15 r 6(1) of the RC in this case. This is because if the plaintiff has wrongly sued DBP (which is not a legal entity under the DBPA), O 15 r 6(1) RC does not provide any lawful basis for the court to allow encl 4. It is incumbent on the plaintiff to amend the writ and statement of claim to substitute the board in place of DBP in this action.

WHETHER DAMAGES ARE AN ADEQUATE REMEDY FOR PLAINTIFF

[10] Clause 5 of the contract and Schedule E to the contract provide that the total payment for the plaintiff's services is RM8,175,998.42. As such, I have no hesitation to decide that damages are an adequate remedy for the plaintiff in this action — please see the judgment of Hashim Yeop Sani CJ (Malaya) in the Supreme Court case of *Associated Tractors Sdn Bhd v Chan Boon Heng & Anor* [1990] 2 MLJ 408 at p 409; [1990] 1 CLJ Rep 30 at p 32. Enclosure 4 is therefore dismissed with costs on this ground.

[11] Alternatively or additionally, the plaintiff bears the evidential onus to satisfy this court that the damages are not an adequate remedy for the plaintiff — please see the Court of Appeal's judgment delivered by Ahmad Fairuz JCA (as he then was) in *Gerak Indera Sdn Bhd v Farlim Properties Sdn Bhd* [1997] 3 MLJ 90 at p 99. I am of the view that the plaintiff has failed to discharge the

evidential burden to persuade the court that damages are not a sufficient relief for the plaintiff in this case.

WHERE DOES BALANCE OF CONVENIENCE LIE?

[12] Based on the Supreme Court's judgment delivered by Mohd Jemuri Serjan CJ (Borneo) in *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241 at pp 270–271, where the balance of convenience lies depends on which proposed court order carries a lower risk of injustice. If the grant of an interim restraining injunction carries a lower risk of injustice than its refusal, the balance of convenience lies in favour of the grant of an interlocutory restraining injunction. Conversely, if the grant of an interim prohibitory injunction carries a higher risk of injustice than its refusal, the balance of convenience lies against the grant of the interim prohibitory injunction.

[13] I am of the view that a refusal of encl 4 carries a lower risk of injustice than to allow an interlocutory injunction in this case. This decision is premised on the following reasons:

(a) if encl 4 is dismissed and the plaintiff succeeds at the trial of this action (provided that the plaintiff substitutes the board for DBP in this case), damages are an adequate remedy for the plaintiff — please see the above para 10. The board is a statutory body under the DBPA and there is no reason to doubt its commercial solvency. In fact, the plaintiff has not alleged that the board is commercially insolvent; and

(b) if encl 4 is allowed, this will cause serious and irreparable prejudice to primary school students of the Islamic faith throughout Malaysia because they will be deprived of the books for the purpose of their religious education. Such a prejudice cannot be compensated in monetary terms.

Based on the above reasons, encl 4 is dismissed with costs because the balance of convenience lies heavily against the grant of an interim prohibitory injunction in this case.

GRANT OF INTERLOCUTORY RESTRAINING INJUNCTION IS CONTRARY TO PUBLIC INTEREST

[14] The following High Court cases have refused to grant interim prohibitory injunctions on the ground of public interest:

(a) the judgment of Edgar Joseph Jr J (as he then was) in *Saw Seng Kee v Director of Lands & Mines, Penang & Ors* [1987] 1 MLJ 80 at p 82; and

(b) Mohd Noor J's (as he then was) decision in *Saonah bte Bedul v Pentadbir*

Tanah dan Daerah Melaka Tengah [1994] 3 MLJ 758 at p 764.

[15] In the Court of Appeal case of *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 at pp 206-207, Gopal Sri Ram JCA (as he then was) has held that the court deciding an interlocutory restraining injunction application should consider, among others, public interest.

[16] If encl 4 is allowed, this will deprive primary school students of the Islamic faith throughout Malaysia of the books for the purpose of their religious education. The grant of such an interlocutory injunction in this case is clearly contrary to public interest.

CONCLUSION

[17] The upshot is that encl 4 is dismissed with costs. Any party dealing with the board should ensure that the board (not DBP) is the contracting party and if there is litigation, the board (not DBP) should be cited in legal proceedings.

Plaintiff's application dismissed with costs.

Reported by Mohd Kamarul Anwar